BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICKEL W. HUTCHISON	)	
Claimant	)	
	)	
VS.	)	
	)	
DEFFENBAUGH INDUSTRIES, INC.	)	
Respondent	)	Docket No. 1,019,656
	)	
AND	)	
	)	
ZURICH AMERICAN	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 21, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

The ALJ denied claimant's request for benefits as he concluded "[c]laimant has failed to prove as more probably true then [sic] not he sustained the accident alleged in light of his credibility and his denial of subsequent non work related activities performed."[1]

The claimant requests review of this finding alleging his recitation of the accidental injury on June 23, 2004 is uncontroverted, and thus, the ALJ inappropriately denied his request for medical treatment for his neck and left upper extremity complaints. Claimant further alleges the ALJ improperly admitted evidence which purported to impeach claimant's testimony and attack his credibility, all in violation of K.S.A. 60-422.

[1] ALJ Order (Apr. 21, 2005).

Respondent has not filed a brief with the Board, but presumably would contend the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by the respondent as a mechanic. In May, 2004 he fractured his little finger on his left hand.[2] Respondent referred claimant to a physician for treatment, and when claimant expressed some difficulty in performing his regular duties, he was assigned to work at the recycling center, an assignment that is considered light duty.

While working in the respondent's recycling center, claimant testified he was lifting and cutting 100 pound paper rolls when he felt something "pop" in his shoulder.[3] Respondent concedes the recycling plant has large rolls of paper and that these large rolls are cut by a machine. However, Tom Steck, the workers compensation administrator, denies that a single worker would ever be required to lift these rolls, nor was claimant ever assigned to this position.[4]

According to claimant, he reported this accident to his supervisor at the recycling plant and to Tom Steck. Mr. Steck testified that claimant did come to him on June 23 or 24 and indicated he was experiencing numbness in his little finger and ring finger on his left hand. Mr. Steck further testified claimant informed him that he had been lifting 100 pound rolls of paper. Mr. Steck was confused by this statement as claimant should not have been performing such work given his earlier accident and subsequent assignment to light duty. Mr. Steck was never able to determine how it was that claimant was asked to perform such a job.

Claimant was sent to Dr. Robert Coleman for treatment and was sent back to the recycling center to perform the normal light duty, sorting trash for recycling. While treating claimant, Dr. Coleman apparently had him undergo an EMG. The results of this test were returned in July and claimant was diagnosed with epicondylitis. Claimant was returned to regular duty sometime in July and he continued to work for a period of time.

On his own, claimant sought treatment from his family physician, Dr. Clifford Johnson, who referred him to Dr. Mark Maguire. Claimant told Dr. Maguire of the lifting

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[2] This accidental injury is not the subject of this claim.

[3] P.H. Trans. at 8.

[4] *Id.* at 44.

incident with the paper rolls, and that his physical complaints were limited to his elbow and radiating pain down to the wrist. He did not complain of any neck pain. Dr. Maguire diagnosed lateral epicondylitis at the elbow and suggested a cortisone injection, which was performed. He also suggested claimant have a MRI to the left shoulder as he has a history of rotator cuff problems.

Claimant was also seen by Dr. Tyann Hamedi, at respondent's request on September 23, 2004. Again, claimant's complaints were limited to numbness in his little finger and ring finger of his left hand, as well as his left elbow and shoulder, all of which he related to his June 23, 2004 accident lifting paper rolls.

Dr. Maguire saw claimant again on September 29, 2004. At this point, Dr. Maguire took claimant off work in order to provide him with some physical therapy to both the elbow and the shoulder. Claimant applied for and was granted leave under the Family Medical Leave Act.

While claimant was off work he sought further treatment from his own physician, Dr. Johnson, who ordered an MRI of the cervical spine. According to the records, this MRI revealed moderate bilateral foraminal narrowing at C3-C4, mild to moderate left foraminal narrowing at L4-L5 and moderate to severe bilateral foraminal narrowing at C5-C6. Dr. Johnson referred claimant to Dr. Frank Holladay.

Dr. Holladay's records indicate claimant was complaining of neck and left shoulder and arm pain which he related to a lifting event *at the end of September*.[5] According to Dr. Holladay, claimant reported that virtually any activity makes his problems worse, including moving, standing, bending, sneezing, coughing and sitting. Dr. Holladay diagnosed problems that are "multifactorial".[6] He indicated that the defects at C4-5 and C5-6 are related to arthritic degenerative changes and that claimant "was destined to have cervical radicular problems whether he was lifting at work or doing something at home."[7] Moreover, C6 and C7 were congenitally fused. He recommended claimant have surgery, specifically a two-level anterior cervical diskectomy and fusion at C4-5 and C5-6. Without the benefit of a preliminary hearing, this surgery was done in December 15, 2004.

At the preliminary hearing, it was revealed that claimant denied any previous neck problems or injuries and that he had denied performing any outdoor maintenance activities or riding his motorcycle. A private investigator was hired and engaged in surveillance of claimant between October 2004 and early January 2005. This effort revealed a series of photographs showing claimant, on various dates and times, digging a hole, carrying away

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[5] *Id.*, Cl. Ex. 1 at 18 (Dr. Holladay's letter dated Nov. 29, 2004).

[6] *Id.*, Cl. Ex. 1 at 19.

[7] *Id.*

a small tree (with his left arm), loading boxes using both arms, mowing the yard (using both arms), carrying small rocks (again with both arms), carrying a rather heavy looking chain with just his left arm, using a crow bar (with both arms), working on his truck and riding a motorcycle for a short period of time.

There was additional testimony from two other witnesses suggesting that claimant had participated in a series of moves, helping others move boxes and furniture between the months of June and December 2004. One of these witnesses, Cynthia Hutchison, claimant's ex-wife, testified that claimant was known to lie. Another witness, Jewell Roark, testified that while she had known claimant to lie to others, she also believed Ms. Hutchison was an unbelievable source.

The ALJ weighed this evidence and concluded claimant's credibility had been significantly compromised. He indicated his decision to deny claimant benefits was based upon his denial of subsequent nonwork-related activities. Obviously, the photographs showing claimant performing a series of arguably strenuous activities were persuasive. Moreover, they are wholly inconsistent with his representation to Dr. Holladay that virtually every activity causes him increased pain. The Board has considered this finding as well as the parties' evidence and finds no reason to disturb the ALJ's conclusion.

Claimant makes much of the fact that his recitation of the facts surrounding the accident have not been controverted. In essence, he argues that since respondent hasn't denied the accident took place, he is entitled to benefits. Under these facts, the Board disagrees.

The Board is mindful of the well established maxim of workers compensation law that uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.[8] And that the trier of fact is not obligated to accept any evidence which in its opinion is unreliable even if such evidence is uncontradicted.[9] In this instance, the Board believes, as did the ALJ, that claimant's recitation of the events surrounding his physical complaints has been shown to be untrustworthy. Claimant denied engaging in the some of the same activities depicted in the photographs offered as evidence at the preliminary hearing. His alleged accident was apparently unwitnessed and while respondent concedes there are 100 pound rolls of paper, it is wholly unclear why claimant was lifting them when he had been assigned to the recycling center to perform light duty work. Even if the accident happened as claimant alleged, the medical records reveal a significant delay in the onset of his neck complaints. In the interim, he was performing other activities outside of work which could realistically have caused the complaints he now expresses.

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[8] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[9] *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and one of respondent's representatives testify in person. In denying claimant's request for medical treatment, the ALJ apparently believed Mr. Steck's testimony over the claimant's. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Accordingly, the ALJ's preliminary hearing Order is affirmed.

Finally, claimant suggests that the ALJ violated the rules of evidence, specifically K.S.A. 60-422, by allowing the testimony of Cynthia Hutchison and Jewell Roark, both acquaintances of claimant, as well as Richard Swink, a private investigator. Claimant maintains the evidence offered by these individuals was irrelevant and intended to impeach his credibility by opinion or evidence of reputation. Claimant's argument is unpersuasive.

By statute, the ALJ "shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence" so that the parties are ensured an expeditious and unbiased hearing.[10] Because workers compensation proceedings are no controlled by strict rules of evidence, evidence is more liberally admitted. The ALJ did nothing improper. And in any event, such an issue is not jurisdictional at this stage of the proceedings.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated April 21, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2005.

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BOARD MEMBER

c: Lawrence G. Rebman, Attorney for Claimant
Steven C. Alberg, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] See K.S.A. 2003 Supp. 44-523; See also McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257 (1996).